STATE OF MICHIGAN

COURT OF APPEALS

JACQUELINE MANESS,

Plaintiff-Appellant,

v

CARLTON PHARMACY,

Defendant,

and

CRYSTAL KLEEN CLEANERS COMPANY and VICKIE ASHER,

Defendants-Appellees.

UNPUBLISHED
October 22, 2009

No. 287486
Monroe Circuit Court
LC No. 05-020422-NO

Before: Fort Hood, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition for defendants Crystal Kleen and Asher. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This slip-and-fall case was in this Court on a previous occasion. Plaintiff fell on Carlton's floor, which Asher (who worked for Crystal Kleen) had just mopped. Although Asher put out "wet floor" signs, the dispute focused on whether the warning was adequate. Initially, the trial court found a question of fact regarding whether the hazard was open and obvious, but this Court reversed. *Maness v Carlton Pharmacy, LLC*, unpublished opinion per curiam of the Court of Appeals, issued May 31, 2007 (Docket Nos. 271581, 271976). This Court held that the hazardous condition was open and obvious and not unreasonably dangerous. Of particular note in the analysis was a surveillance video that captured plaintiff's fall on-screen, removing debate over where plaintiff was, which way she was walking, where the warning signs were, and whether anyone else walked there. This Court noted that the trial court erroneously applied the "open and obvious hazard" test to Asher and Crystal Kleen: not being in possession of the premises, the correct test is that of general negligence. *Id*., slip op at 6. Nonetheless, this Court found that the record evidence showed no genuine issue of material fact that Asher performed her duties with due care.

However, our Supreme Court vacated that portion of this Court's decision finding Asher and Crystal Kleen not liable as a matter of law because the question of ordinary negligence "was neither raised . . . nor considered by the trial court." *Maness v Carlton Pharmacy, LLC*, 480 Mich 1100; 475 NW2d 111 (2008). Justice Markman dissented, stating that the Court of Appeals conclusion was correct: "The determination by the Court of Appeals that the 'wet floor' sign made the condition of the floor 'open and obvious' for Carlton Pharmacy's purposes necessarily demonstrates that Krystal [sic] Kleen and Asher performed their duty to warn of the condition." *Id*. at 1101 (Markman, J., dissenting). On remand to the trial court, Asher and Crystal Kleen moved for summary disposition, arguing that there was no evidence Asher was negligent in how she placed the signs. At the motion hearing, the court granted the motion and put its reasons on the record: "As the Court of Appeals held, and as Justice Markman would hold, if it was open and obvious I don't see how one could find a breach of the due care requirement . . . ." This is the ruling here being appealed.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, the non-moving party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Whether a defendant owed a duty to the plaintiff is a question of law, also reviewed de novo. *Byker v Mannes*, 465 Mich 637, 643; 641 NW2d 210 (2002).

"Duty" considers whether a defendant is under any obligation to the plaintiff to avoid negligent conduct. *Moning v Alfono*, 400 Mich 425, 436-437; 254 NW2d 759 (1977). "Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person." *Id*. at 438-439. Thus, it depends in part on foreseeability—whether it is foreseeable that the actor's conduct may create a risk of harm to the victim. *Id*. at 439. The duty to warn only arises when there is a foreseeable victim. *Groncki v Detroit Edison Co*, 453 Mich 644, 656; 557 NW2d 289 (1996).

The similarity between the "open and obvious hazard" doctrine and general negligence was recognized by this Court in *Laier v Kitchen*, 266 Mich App 482, 494; 702 NW2d 199 (2005). The applicable standard for "open and obvious" is whether "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). For general negligence, the standard for determining if a defendant breached its duty to warn is whether the defendant warned the plaintiff of foreseeable danger that could arise from the defendant's conduct. See *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703; 532 NW2d 186 (1995).

In this case, there is no dispute that a wet floor can be slippery, and that Asher's job required her to make it so. It is also unquestionably foreseeable that customers could slip on the

floor if they did not know it was wet and thus failed to use due care in the area. Thus, there is no question that Asher's duty extended to providing adequate warning that the floor might be slippery so customers could either avoid it or walk carefully.[1] Certainly Asher's duty did not extend so far as to make her liable for customers who saw the sign, traversed the floor, and fell anyway, especially because there was no allegation that she made the floor more slippery than a normal, wet floor. The question is only whether it was foreseeable that the warning would be undetected by some of the customers so that she should have placed more signs or placed them differently. This Court has already held as a matter of law in the premises claim that the wet floor was open and obvious with the signs placed as they were. That means, "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Novotney, supra*. While the existence of an open and obvious condition is not always conclusive regarding the actor's negligence, under the facts of the present case, that conclusion means Asher could not have done more. She could not make the hazard more apparent if it was already "open and obvious."

Affirmed.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Pat M. Donofrio

[1] Defendants concede that they "owed Plaintiff a general duty to warn of the dangerous condition of the floor." Although this is not correct under *Fultz v Union-Commerce Assoc*, 470 Mich 460, 467; 683 NW2d 587 (2004), where our Supreme Court held, "the threshold question is whether the defendant owed a duty to the plaintiff that is *separate and distinct from the defendant's contractual obligations* [emphasis added]," this question is not properly before us and we decline to address it here.